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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/672,232	09/25/2003	Mark J. Chimel	5677-216	8713
26345	7590	08/16/2007		
GIBBONS P.C.			EXAMINER	
ONE GATEWAY CENTER				PADEN, CAROLYN A
NEWARK, NJ 07102			ART UNIT	PAPER NUMBER
			1761	
			NOTIFICATION DATE	DELIVERY MODE
			08/16/2007	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

thibbits@gibbonslaw.com  
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IPDocket@gibbonslaw.com

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/672,232	CHIMEL ET AL.
	Examiner Carolyn A. Paden	Art Unit 1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 09 July 2007.  
 2a) This action is FINAL.                            2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 6-10,27 and 45-61 is/are pending in the application.  
 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
 5) Claim(s) \_\_\_\_\_ is/are allowed.  
 6) Claim(s) 7 is/are rejected.  
 7) Claim(s) 6-8-10,27 and 45-61 is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) <input type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date. _____
3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____	5) <input type="checkbox"/> Notice of Informal Patent Application
	6) <input type="checkbox"/> Other: _____

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 7 is rejected under 35 U.S.C. 103(a) as being obvious over Kealey (6,599,553).

The applied reference has a common inventor with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art only under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 103(a) might be overcome by: (1) a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not an invention "by another"; (2) a showing of a date of invention for the claimed subject matter of the application which corresponds to subject matter disclosed but not claimed in the reference, prior to the effective U.S. filing date of the reference under 37 CFR 1.131; or (3) an oath or

declaration under 37 CFR 1.130 stating that the application and reference are currently owned by the same party and that the inventor named in the application is the prior inventor under 35 U.S.C. 104, together with a terminal disclaimer in accordance with 37 CFR 1.321(c). This rejection might also be overcome by showing that the reference is disqualified under 35 U.S.C. 103(c) as prior art in a rejection under 35 U.S.C. 103(a). See MPEP § 706.02(l)(1) and § 706.02(l)(2).

Kealey discloses a dry drink mix of chocolate containing emulsifier, and cocoa procyanidin (claim 1). The procyanidin content of a variety of cocoa products is shown in Table 4 and appears to fall within the range of the claims. The cocoa polyphenols were added to a variety of foods as shown in Table 1A. The lecithin content of the drink is shown at the top of column 52 and appears to be within the range of the claims. Although the drink mix is not described as a food additive or food supplement, it would have been obvious at the time of applicants' invention to utilize the cocoa of Kealey in a chocolate or cookie formulation.

Applicant argues that Kealey does not show cocoa ingredients that include cocoa solids pretreated with lecithin. This has been considered but is not persuasive. Example 11 shows these features. It is appreciated that

the example does not mention a pretreatment step but the claims are directed to a product and not to a process. The cocoa solids are the solid components of the cocoa powder used in example 11. Cocoa powder is generally known in the art to be the result of the partial removal of cocoa fat for chocolate liquor.

Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over Myers (6,194,020) or (6,399,139).

Myers discloses cocoa polyphenols for use in confectioneries. At column 7, lines 46-50 of '020 and column 7, lines 44-48 of the '139, chocolate liquor is described as having the cocoa procyanidins of the claims. At column 25 of '020 and example 8 of '139 a chocolate formulation including lecithin is shown. The claims appear to differ from Myers in the recitation of the use of chocolate as an additive. Chocolate is a well-known ingredient in cake and cookie recipes. It would have been obvious to one of ordinary skill in the art to use the chocolate of Myers as an additive in a cake formulation.

Applicant argues that Myers does not show cocoa ingredients that include cocoa solids pretreated with lecithin. This has been considered but is not persuasive. Example 8 in both patents shows these features. It is

appreciated that the example does not mention a pretreatment step but the claims are directed to a product and not to a process. The cocoa solids are the solid components of the cocoa powder used in example 8. Cocoa powder is generally known in the art to be the result of the partial removal of cocoa fat for chocolate liquor.

Applicants' response to the 112 rejection of claim 10 is sufficient to overcome the rejection.

Claim 6, 8, 9,10, 27, 45-61 are allowed.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory

period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks, can be reached on (571) 272-1401 or by dialing 571-272-1700. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

*Carolyn Paden*  
CAROLYN PADEN 8-9-07  
PRIMARY EXAMINER 1761